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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/667,559	09/22/2003	Hubert Kurzinger	12742.0005USI1	9973

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EXAMINER	
SAYALA, CHHAYA D	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 05/31/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/667,559	KURZINGER ET AL.	
	Examiner	Art Unit	
	C. SAYALA	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 February 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-22* is/are pending in the application.

4a) Of the above claim(s) *11-22* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-10* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

Applicant's election without traverse of claims 1-10 in the reply filed on 2/28/05 is acknowledged.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

1. Claims 1-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 768189 in view of EP 0337573, Kim (US Patent 5773051), Bunch (US Patent 5618574) and Baensch (US Patent 3796812).

The GB patent teaches a flaked feed with a moisture content of 12-45% (page 2, col. 2, line 86), temperature sensitive materials at page 2, col. 1, line 15; col. 2, lines 124-126. The thickness is taught as 0.5 – 1.5 mm. The patent suggests the presence of sugars at page 2, line 52. The patent does not teach that the thickness is 10-350 μm, the size, yeast or shapes. Note that the patent teaches an embodiment wherein the flake is pressed after the addition of temperature sensitive materials and without heating, thus retaining water content. See page 3, col. 1, lines 5-10 and col. 2, lines 65-70.

EP' 573 also teaches flakes that contain sugars and are of a thickness of 0.2 -3 mm, which falls within the claimed range. See page 2, lines 29, 30.

Kim teaches fish feed which contains glucose among other conventional ingredients for a fish feed, which floats after sinking. The feed is flake-type (col. 2, line 34) has a water content of 15-25%, the diameter of the flake is 1-10 mm, in thickness, which falls within the claimed range. Note the temperature-sensitive ingredients at Table I.

Baensch teaches a fish-feed composition that includes yeast as one of its ingredients. Note that the feed is in the form of a sheet of "thin-walled thickness". Additionally, the reference teaches the flake thickness at col. 2, line 40, which thickness size falls within the claimed range.

Bunch teaches that the ingredients in a number of commercial fish feeds, which include flaked feeds (col. 1, line 26). See col. 3 that teaches conventional ingredients, which includes yeast and bacteria. The patent also teaches growth promoting ingredients.

It would have been obvious to incorporate these ingredients in the primary reference composition, as they have been used in prior art compositions for their art recognized properties or as conventional ingredients in fish feed, as disclosed by these secondary references. The size and thickness of the flake in the instant claims fall within the limits taught by the prior art, as noted above and there appears to be no patentable distinction, therefore. The shape of the flaked feed is not taught by the prior art but this feature would be considered as a matter of personal choice of the artisan

since fish by themselves have no preference to shape and neither can they distinguish such features.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-10 rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-9 of U.S. Patent No. 6623770. Although the conflicting claims are not identical, they are not patentably distinct from each other because the ingredients are the same, the thickness falls within the scope of the instant claims and the moisture content is the same.

Response to Arguments

Applicant's arguments filed 2/28/2005 have been fully considered but they are not persuasive.

While applicant admits that some of the references teach the flake thickness, he states that all the references do not. He also criticizes the references for not teaching the moisture content. The GB '189 patent teaches the moisture content, even teaching embodiments where the flaked product does not appear to undergo any heat treatment at all. See page 3, col. 1, lines 5-10 and col. 2, lines 65-70. The other references teach the use of various elements of applicant's claims with regard to the ingredients. As for the criticism that some references use their flakes for "land animals" and not fish feed, applicant is reminded that for composition claims, intended use of an otherwise old or obvious composition cannot render a claim patentable. In re Zierden, 162 USPQ 102.

As for combining references without any motivation, all the references are drawn to feeds, to flaked products and one of ordinary skill in the art who is considering flaked feeds would have been motivated to consider the above references pertaining to same endeavor which is, to flaked feeds. It should also be noted that these references have been combined under 35 USC 103, and as such it is not required that every element of the claims be taught by each reference, but that when the references are considered as a whole, they render obvious the instant invention. From the range of moisture taught by the GB reference and the heating/drying step, it would have been obvious to optimize the amount of moisture in the flaked feed. On the other hand, the reference also teaches that the moisture content suggested in the range 12-45%, be maintained without heating the product so as to not affect the temperature sensitive ingredients. Such suggestions/embodiments render obvious the moisture content. Under 35 USC 103, a reference must be considered not only for what it expressly teaches, but also for

what it fairly suggests. *In re Burckel*, 592 F.2d 1175, 1179, 201 USPQ 67, 70 (CCPA 1979). One of ordinary skill in the art is held accountable not only for the specific teachings of references, but also for the inferences which those skilled in the art may reasonably be expected to draw. *In re Hoeschele,* 160 USPQ 809, 811, (CCPA 1969).

This action is being made FINAL even though the previous Office Action did not include the obviousness type double patenting rejection because the patent used for the rejection is applicant's own and he was aware that the claims of the instant case were similar to the patented claims in scope.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA whose telephone number is 571-272-1405.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

C. SAYALA
Primary Examiner
Group 1700.